# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 16, 2006 |
| v | No. 258565<br>Wayne Circuit Court |
| JOEY DYER,<br><br>Defendant-Appellant. | LC No. 04-003771-01 |

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for first degree, premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. The trial court sentenced defendant to concurrent terms of life imprisonment on the murder charge, 210 months to 60 years on the assault charges, and 18 months to 5 years on the felony firearm charge, all of which he will serve after he serves his mandatory consecutive sentence of 2 years' imprisonment for felon in possession. We affirm.

On the night of the shooting, defendant and his three victims decided to drive to a club for a night out. Defendant rode in the rear passenger-side seat of the car. When the group arrived near the club, defendant insisted that the driver park his car on a dark street near an open field. Defendant then drew his pistol, chambered a new round, and fatally shot the driver under his right ear as the driver turned off the car. Defendant then turned and shot at, but missed, the ducking front-seat passenger. When he turned the pistol on the other back-seat passenger, the passenger struggled with defendant and the pistol discharged again, hitting the back-seat passenger in the shoulder. During the scuffle over the pistol, the front-seat passenger made his escape. Defendant opened his door, and the back-seat passenger managed to wrestle defendant out the door and escape. Defendant continued to shoot at the fleeing victims, each of whom summoned assistance.

Defendant fled the state and established a relationship with a major drug dealer in Atlanta. Defendant and his new mentor relocated to Florida, where they were picked up with false identification by Florida police. The drug dealer and his girlfriend testified that defendant described the Michigan shooting to each of them, and defendant also admitted to a Florida detective that he "did" the instant offenses.

On appeal, defendant first argues that the trial court erred in allowing the prosecutor to admit statements made by the driver weeks before the shooting. Defendant argues that the statements violate his right to confrontation as delineated by the United States Supreme Court in *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We disagree. The statements at issue involved one of the many subplots that unfolded in defendant's four-day trial. The trial court introduced the statements to suggest that a man named Avis Kassab arranged the driver's murder to prevent the driver from testifying about a murder Kassab committed in the driver's presence. The driver's statements indicate that he took a bribe from Kassab's brother, but Kassab later failed to pay off the balance of the bribe, so the driver decided to breach the agreement and testify against Kassab. Because the driver's own statements implicated him for accepting a bribe to commit perjury, this hearsay falls squarely within the exception for statements against a declarant's penal interest. MRE 804(b)(3). Nevertheless, defendant does not challenge the technical exceptions to hearsay, but exclusively argues that the evidence violated his right to confront the witnesses against him. In this regard, defendant fails to distinguish *People v Jones*, ___ Mich App ___, slip op p 3-4; ___ NW2d ___ (Docket No. 258571, issued March 7, 2006), in which our Court held a defendant does not have a right under *Crawford* to confront a witness whose absence the defendant has wrongfully procured. Because the overwhelming evidence indicated that defendant wrongfully procured the driver's absence by unlawfully killing him, defendant fails to establish that the evidence violated his constitutional right to confront the driver. *Jones*, *supra*; see also *Crawford*, *supra* at 62.

Defendant next argues that the prosecutor's cross examination of defendant also violated his right to confrontation by injecting unsubstantiated innuendo into the trial. Assuming without deciding that a prosecutor's question, even one loaded with innuendo, can deprive a defendant of a right to confrontation, defendant fails to demonstrate any misconduct requiring reversal. Regarding the innuendo injected by the prosecutor's impeachment of defendant with his prior inconsistent statements, "extrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Therefore, it goes without saying that, "the examiner does not have a duty in every case to introduce the factual predicate for his question." *United States v Harris*, 542 F2d 1283, 1306-1307 (CA 7, 1976). This includes a cross examination "where evidence is available but where counsel has no present intention of introducing it or where counsel has no factual foundation but a reasonable suspicion that the circumstances might be true." *Id*. This might occur because a criminal defendant is the source of the collateral information, and the prosecutor has no inclination to call him in the prosecutor's case in chief. See *Hazel v United States*, 319 A2d 136, 140 (DC 1974).

The general rule is that innuendo in a cross examination question is not misconduct unless the prosecutor lacks a legitimate factual basis for the question, or if a legal (as opposed to a procedural) restriction or other factual circumstance precludes the prosecutor from introducing the factual basis for the question. See 6 Wigmore, Evidence (Chadbourn rev), § 1808(2), pp 369, 371-375; *United States v Felsen*, 648 F2d 681, 685-686 (CA 10, 1981); *United States v Silverstein*, 737 F2d 864, 868 (CA 10, 1984). Applying the rule to defendant's case, defendant fails to demonstrate that the prosecutor lacked any factual basis to question defendant about his inconsistent statements or the other collateral matters. In fact, the record indicates that before trial defense counsel perused a substantial amount of the information containing the questions'

factual underpinnings. Therefore, defendant has failed to demonstrate abuse of discretion by the court or misconduct by the prosecutor. *Silverstein*, *supra*.

Defendant also argues that the prosecutor shifted the burden of proof to him, but the prosecutor's isolated comment merely expressed the legal reality that nothing required her to prove or disprove defendant's theory, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), and legitimately emphasized defendant's failure to call corroborating witnesses. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). Therefore, the isolated comment did not shift the burden of proof to defendant.

Defendant also argues that the prosecutor deprived him of a fair trial by wrongfully introducing character evidence contrary to MRE 404(b), and that the trial court abused its discretion by allowing the prosecutor to introduce it. We disagree. We will reverse a conviction if a prosecutor's misconduct deprives a defendant of a fair trial, *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003), but we will not reverse if defendant failed to object and the trial court could have cured any prejudice with a timely instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We review for abuse of discretion a trial court's decision on evidentiary matters. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The evidence cited by defendant ranged from rather innocuous evidence of defendant's taste in "gangster" films and "gangster" rap to evidence of his involvement in the illicit drug trade and his purchase of illegal firearms. Nevertheless, defense counsel insinuated early on in the case that defendant acted in self-defense because the driver and front-seat passengers were rival drug dealers who had decided to kill defendant. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Other evidence of defendant's drug activities served the legitimate purpose of negating defendant's claim that he received a large sum of money through sales of drugs rather than through a contract to murder the driver. Therefore, this evidence did not deprive defendant of a fair trial. Although the evidence of defendant's illicit ownership of other pistols was largely irrelevant, the trial court properly curtailed this evidence when defendant objected, and nothing suggests bad faith on the part of the prosecutor. Besides, any prejudice defendant suffered from the jury's knowledge that he had once owned *other* illegal firearms pales in comparison to the prejudice he legitimately suffered from the evidence that he was a drug-dealing felon who was concealing an illegally owned pistol on the night of the shooting. Similarly, the prosecutor's passing references to defendant's slang, tastes, or number of girlfriends did not garner objections and were not so prejudicial that they were incurable. *Stanaway*, *supra*. Exclusion of the questionable evidence most likely would not have altered the verdict, so any error in its introduction was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also cites *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985), for the proposition that the prosecutor committed misconduct by asking defendant if prosecution witnesses were lying. Although we agree that this was inappropriate conduct, defendant, like the defendant in *Buckey*, handled the questions well and emerged from the brief questioning unscathed. Therefore, the unpreserved misconduct does not require reversal. *Id.*; *Stanaway*, *supra*.

Defendant next argues that the trial court erred in allowing the introduction of a detective's testimony that defendant essentially admitted he committed the crimes. We disagree. Defendant first argues, without citation to authority, that the testimony violated his right to discovery. The record indicates that the witness was listed by the prosecutor, and nothing indicates that the trial court ordered the prosecution to provide defendant with a transcript of what she expected her witnesses to reveal at trial. When the witness informed the prosecutor that he could testify about defendant's statements, the prosecutor immediately notified defendant, and the trial court, in light of the new information, offered defendant more time to prepare for the witness's cross examination. Under the circumstances, the trial court and prosecutor took every reasonable step to preserve defendant's rights. *People v Taylor*, 159 Mich App 468, 484-487; 406 NW2d 859 (1987). Moreover, because the detective testified that defendant initiated the conversation, and the detective's responses to defendant were in no way perceivable as statements to elicit an incriminating response, *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995), the trial court did not clearly err when it held that defendant's statement was admissible despite the lack of *Miranda*[1] warnings.

Defendant next contends that the trial court allowed evidence presented by the prosecution, but denied the defense the opportunity to present similar evidence. The record indicates that there are actually more legal dissimilarities than similarities in the evidence about which defendant complains, and that the similarities in the evidence are coincidental and superficial. Ultimately, defendant fails to explain how the trial court erred in admitting the prosecutor's evidence or erred in excluding his evidence, so defendant abandons this issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Similarly, defendant abandons his cursory claim of ineffective assistance of counsel, because he fails to substantiate any of the errors cited or indicate how they prejudiced his defense. *Id*.

Finally, defendant argues that the trial court erred in its jury instructions by instructing the jury that it could presume intent and by denying his motion to instruct on voluntary manslaughter. Defendant's first argument fails because it lacks factual foundation. The trial court correctly instructed the jury that it could "infer," not presume, the intent to kill from the use of a deadly weapon in a way likely to cause death. CJI2d 16.21; *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Regarding voluntary manslaughter, neither defendant's nor his two surviving victims' version of events suggested that defendant intentionally killed the driver under circumstances that would suggest voluntary manslaughter. The victims testified that defendant began shooting without any preliminary discussion. Defendant's testimony suggested that he pulled the pistol in fear of his life, but the back-seat passenger grabbed it before he could shoot, causing the pistol to repeatedly, but accidentally, discharge. The victims' testimony does not suggest a heated argument, threats generating "hot blood," or any imperfect defense, and defendant's testimony does not suggest intent. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993); *People v Kemp*, 202 Mich App 318, 327; 508 NW2d 184 (1993); *People v Morrin*, 31 Mich App 301, 311 n 7; 187 NW2d 434 (1971). Therefore, no rational view of the evidence supported the instruction, and the trial court did not abuse its discretion by

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

denying defendant's motion. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray